problem singles out only some persons contributing to the problem and not others who are similarly situated, the regulation is called "underinclusive." "All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include." Joseph Tussmann and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1949). *See also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.06[B] (1984 & Supp. 1992 (RODNEY A. SMOLLA, ED.)). In First Amendment cases that involve the differential treatment of speakers, "[a]s in all equal protection cases ... the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95 (citations omitted). *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–86 (1978).[17]

[17] While we might analyze this case solely under equal protection principles, we primarily apply First Amendment doctrine because of the centrality of the abridgement of petitioners' free speech. *Cf. Arkansas Writers' Project*, 481 U.S. at 227–28 n.3. Under the guarantee of equal protection, when legislating in the area of economic or social policy, the government is generally free to strike against an evil one blow at a time, *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101–02 (1993); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), but a legislative choice burdening the exercise of a fundamental right must pass strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216–17 & n.15 (1982). While the freedom of speech is, of course, a fundamental right, *e.g., Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), courts have developed different standards for its restriction depending on the particulars of the speech or the type of regulation at issue. *Compare, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding where contributions to lobbying organization were generally not tax exempt, exception for veterans organization was speaker-based discrimination not aimed at the suppression of ideas and satisfied rational scrutiny), *with Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press ... places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without

While the Supreme Court has recently noted that the First Amendment does not prohibit underinclusiveness *per se*, *see R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992), it has consistently applied two principles in examining the underinclusiveness of a restriction on speech. First, the Court has held that a restriction on speech may not single out a class of speakers on the basis of criteria that are wholly unrelated to the interest sought to be advanced. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509, 1517 (1993) (holding removal of commercial newsracks in order to promote safety and aesthetics in violation of First Amendment because noncommercial newsracks posing identical problems remained unregulated); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down prohibition on disclosure of sexual offense victims' names where prohibition applied only to instruments of mass communication); *Carey*, 447 U.S. at 465 (holding unconstitutional prohibition on residential picketing in part because exception for peaceful "labor picketing" was unrelated to asserted interest in promoting the privacy of the home). Second, the Court has consistently held that a restriction on constitutionally protected speech must—at a minimum—substantially advance the asserted interest. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down ban on editorializing by noncommercial educational broadcast stations receiving federal funds where prohibition did not substantially promote asserted interest); *Bellotti*, 435 U.S. 765 (same for prohibition on certain corporate speech). Thus the Court has invalidated restrictions on speech in cases where the differential treatment of speakers by a partial regulation remained unjustified in terms related to the asserted interest, or where the regulation did not

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differential taxation." (footnote omitted)); *compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine and right to reply requirement for broadcasting), *and FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down restriction on editorializing by noncommercial educational broadcasting stations receiving federal funds) *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down requirement that newspaper grant right to reply).

substantially accomplish the asserted goal.[18] *See also Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104–05 (1979) (holding statute prohibiting newspapers from publishing juvenile defendant's name unconstitutional because, *inter alia*, in absence of regulation of electronic media it did not accomplish the stated purpose). *But see R.A.V.*, 112 S. Ct. at 2545 (underinclusiveness permissible where totally proscribable speech is at issue and there is no regulation of content) (dictum).[19]

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[18] Finding a regulation underinclusive need not imply that the government is surreptitiously attempting to further a different, unarticulated interest, but leads to the ultimate conclusion that the regulation, and in particular the classification employed, is not tailored to serve the compelling interest. *Accord News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). Without impugning the legislative motive, a court may judge that because the interest asserted is not substantially furthered by the regulation "the 'sacrifice [of] First Amendment protections for so speculative a gain is not warranted . . . .'" *League of Women Voters*, 468 U.S. at 397 (quoting *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1987)). *Cf. Minneapolis Star*, 460 U.S. at 592 ("We need not and do not impugn the motives of the . . . [l]egislature. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (citations omitted)); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

[19] The Supreme Court recently noted in *R.A.V.*:

> There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

112 S. Ct. at 2545 (citing *Sable*, 492 U.S. at 124–26). The government's reliance on this passage for the proposition that indecent material may constitutionally be regulated on leased access alone is unwarranted. *See* Respondents' Brief at 29.

2. Florida Star, Bellotti, *and* League of Women Voters

Applying those constitutional principles to this case, we find that section 10 singles out programmers on leased access channels for regulation, while leaving similar programmers on commercial channels unregulated. *Florida Star, Bellotti,* and *League of Women Voters* similarly involved content-based regulations that selectively applied only to some speakers while leaving identical speech uttered by others unregulated.

In *Florida Star,* the Supreme Court held that a statute prohibiting the publication of a rape victim's name was facially underinclusive because it applied only to "instrument[s] of mass communication," calling into question whether the law advanced the significant interests invoked by the state. 491 U.S. at 540 (internal quotes and citation omitted). The state was under an obligation to "demonstrate its commitment to advancing th[e asserted] interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order[;] ... no such interest [was] satisfactorily served by" the prohibition in *Florida Star. Id.* at 541. The publication of the victim's name in instru-

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The cited passage from *R.A.V.* adds little to our case. First, the passage is dictum because *R.A.V.* held that the statute under review in that case did not pass constitutional muster. 112 S. Ct. at 2550. Furthermore, *R.A.V.* notes that the underinclusiveness of a regulation restricting "totally proscribable speech" need not be justified by reference to a neutral basis only "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The case before us differs in both of these respects. Unlike the fighting words at issue in *R.A.V.,* 112 S. Ct. at 2542, the "indecent" material at issue here is constitutionally protected speech, *Sable,* 492 U.S. at 126. Moreover, there is a much more realistic chance that official suppression of ideas is afoot in this situation, since access programmers tend to be a distinctly alternative voice to the mainstream media. *See* H.R. REP. No. 934, 98th Cong., 2d Sess. 30 (1984).

ments of smaller, local communication appeared equally damaging to the government's asserted interest, and the regulation could not simply "be defended on the ground that partial prohibitions may effect partial relief." *Id.* (citations omitted). *See id.* at 541–42 (Scalia, J., concurring in part) (noting underinclusiveness should suffice for holding the prohibition unconstitutional).

In *Bellotti*, the statute prohibited specified business corporations from spending funds to publicize their views concerning a state income tax amendment. The Supreme Court affirmed the principle that the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784–85 (citing *Mosley*, 408 U.S. at 96). In that case the state had argued, *inter alia*, that the statute protected corporate shareholders who did not want their resources spent on propagating views they did not hold. The Court noted that first, the statute restricted corporate speech only with respect to one kind of ballot question and did not apply to other corporate speech presenting the same trapped shareholder problem. *Id.* at 793. Moreover, the restriction applied only to banks and not other organizations in which individuals may have a comparable membership interest. *Id.*[20] In other words, the statute at issue in *Bellotti* did not substantially advance the government's interest in protecting trapped shareholders. In striking down the statute, the Court concluded that even assuming the compelling nature of the government's interest in protecting the shareholder, there was " 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit" the corporation from speaking. *Id.* at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

League of Women Voters also struck down a restriction on speech that did not substantially advance the asserted inter-

[20] The Court also noted the statute's overinclusiveness because the statute prohibited corporate speech on the income tax amendment even when expressly authorized by the shareholders. *Id.* at 794.

est. At issue was a prohibition on "editorializing" by noncommercial educational broadcasting stations receiving funds from the Corporation for Public Broadcasting ("CPB"). 468 U.S. at 366. As with section 10's exclusive focus on "indecent" speech, the prohibition in *League of Women Voters* was targeted at the content of the speech. *See id.* at 383. The government had argued that the ban was necessary first, to protect stations from becoming the government's "mouthpiece," and, second, to protect them from capture by private interest groups. The Court found that the first interest was not "substantially advanced" by the prohibition. *Id.* at 388. In partial support of that finding the Court noted that the regulation applied exclusively to local station editorials leaving unregulated CPB-funded *programs* which are distributed nationally and "truly have the potential to reach a large audience and . . . have the kind of genuine national impact that might trigger" the purported government coercion that the regulation was aimed to prevent. *Id.* at 391. In other words, if the regulation were truly targeting the problem of government influence as a result of government funding, it could not consistent with the First Amendment single out for regulation editorializing by local broadcast stations receiving government funds, while leaving unregulated nationally distributed programs similarly receiving government funds. The statute did not substantially advance the first interest because it left unregulated the identical problem existing (more egregiously) in a different segment of the same medium. As for advancing the second interest, *i.e.*, preventing stations' capture by private interest groups, the regulations were underinclusive as well "since the very same opinions that cannot be expressed by the station's management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview." *Id.* at 396 (citation omitted). The second interest, therefore, was advanced little—if at all—by the statute. Section 10(b) similarly permits the same indecent material that is segregated and blocked on leased access channels to be transmitted without restriction on commercial

channels which are often national and have a far greater audience.

3. *The Underinclusiveness of Section 10*

The ultimate question surrounding a restriction on free speech remains, of course, whether the government's interest is compelling and "whether the statute—particularly the challenged classification—is narrowly tailored to serve that interest." *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (en banc). However, as *Florida Star*, *Bellotti*, and *League of Women Voters* indicate, a content-based restriction on rights secured by the First Amendment must, at a minimum, substantially advance the asserted compelling interest and must explain the differential treatment in terms relevant to the interest asserted. Examining the legislative findings as we must, *see Sable*, 492 U.S. at 129 (" 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' " (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)); *League of Women Voters*, 468 U.S. at 387–88 n.18 (same), we find that section 10's exclusive focus on leased access for the regulation of indecent speech bears a limited relation at best to the goal of limiting children's exposure to "indecent" programming. Section 10 certainly does not substantially advance that interest, since the identical kind of programming may be transmitted freely on regular commercial channels.

The government argues that its regulation legitimately targets the "squeaky wheel" of indecency on cable access channels. Respondents' Brief at 29. The only evidence supporting the contention that leased access channels present a particular problem with respect to indecency is first, the Commission's assertion that because "no single editor control[s] ... selection and presentation ... on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs," and second, Senator Helms' statements on the Senate floor invoking anecdotal evidence of exposure to sexually explicit material on leased access channels. *First Report and Order*,

8 F.C.C.R. at 1000 ¶ 15, 1001 ¶ 20 & n.20. The FCC proffers no empirical evidence supporting the contention that leased access channels present a special problem of indecent programming that is absent from commercial channels. For example, it presents no evidence that indecent material on access channels takes viewers by surprise in a manner that regular commercial programming does not; there is no evidence that program guides are less helpful in the access context; no evidence regarding the relative prevalence, or severity of indecent material on leased access versus regular commercial channels; and no evidence indicating that children are more frequently exposed to indecent material on leased access channels than on regular commercial channels. Finally, while the Commission may be correct in noting that access channels, unlike pay channels, are part of the basic cable package and thus not individually invited into a customer's home, *see First Report and Order*, 8 F.C.C.R. at 1001 ¶ 20 n.20 (quoting 138 CONG. REC. S646 (daily ed. Jan. 30 1992) (statement by Sen. Helms)); *see also* 138 CONG. REC. S648 (statement by Sen. Thurmond) (same), the same thing certainly is true of the commercial channels that make up the basic cable package and are unregulated by section 10. An indecent program would seem to be equally offensive whether transmitted on leased access channels or commercial channels. *Cf. Discovery Network*, 113 S. Ct. at 1514. In sum, the government has not yet sufficiently justified why free access by programmers should trigger the regulation of indecency.[21] As currently argued, free access "is not an acceptable surrogate for injury," *Florida Star*, 491 U.S. at 540; without further justification, the lack of regulation of commercial channels on the one hand and the regulation of leased access on the other, seems to be unadorned, unsubstantiated preference of one speaker over another.

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[21] Of course even if the government's first contention were proven to be true, *i.e.*, that indecent material on access channels takes viewers by surprise because no single editor controls access channels, the FCC remains under an obligation to demonstrate that its regulation presents the least restrictive remedy for that problem. *Cf. League of Women Voters*, 468 U.S. at 395.

By failing to address the problem of indecent material on regular commercial channels which represent the greater part of the cable medium and reach the same audience (in larger numbers), a serious argument can be made that the regulation selects programmers for regulation by a criterion (*i.e.*, leased access) unrelated to the asserted interest and that the resulting partial regulation does not substantially further the government's asserted interest. This would lead us to hold that the statute and implementing regulations are not narrowly tailored to serve the asserted interest. However, for reasons stated below, instead of striking down this part of the regulation, we remand the case to allow the FCC either to justify or to cure the underinclusiveness of the selective approach to the regulation of indecency represented by the remainder of the regulation after the total ban provision has been struck down. Should it decide to pursue the former path, it must explain the selective regulation of leased access channels in terms relevant to the government's asserted goal and determine the impact of the regulation on the accomplishment of the asserted interests. In so doing, the FCC may examine, *inter alia*, the relative prevalence and severity of and the relative exposure of children to indecent material on leased access channels.

C. *Remand to the FCC*

The segregation and blocking requirements apply only to leased access channels. As enacted by Congress, section 10's regulation of indecency exhibited some measure of symmetry among leased access, PEG access and regular commercial channels, because the cable operator could eliminate indecent material from all three types of channels. We have held today that authorizing cable operators to ban indecent material from leased and PEG access channels is unconstitutional. Were this provision to be severed from the regulations, the remainder of the regulations would require indecent material on leased access channels to be segregated and blocked, while leaving PEG access and regular commercial channels free from any regulation. Moreover, while the cable operator would remain free to regulate indecent material on regular

commercial channels, the cable operator is now absolutely prohibited from regulating constitutionally protected indecent material on PEG channels. In other words, were we to sever the segregation and blocking requirement, the result would be a regulatory scheme which singles out indecent material on leased access channels alone for regulation, seemingly without adequate justification. We are therefore reluctant to sever that part of the regulations authorizing a complete ban on indecent access programming from the blocked channel portion and to reach out to decide the constitutional issue presented thereby both as to underinclusiveness and as to the blocked access technique itself, without permitting the FCC to decide again if this is a desirable or feasible regulatory scheme.

" 'The cardinal principle of statutory construction is to save and not to destroy.' " *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). "The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*)) (internal quotes and citation omitted). The presumption of severability has been held to vary with the existence of a severability clause in the statute in question. *See Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938) (severability clause reverses presumption of inseparability); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) (same). More recently, however, the Supreme Court has indicated a presumption in favor of severability regardless of the existence of a severability clause: "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685 (footnote omitted). *See id.* at 686 ("Congress' silence is just that—silence—and does not raise a presumption against severability") (citing *Tilton*, 403 U.S. at

684 (plurality) and *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)); *accord Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). *But see Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 442 (D.C. Cir. 1982) ("We do not view the imposition of any unspecified burden on either side as beneficial to the inquiry."), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); *accord Jackson*, 390 U.S. at 585 n.27 ("determination of severability will rarely turn on the presence or absence of" severability clause).

The analysis differs little in the context of invalidating provisions of regulations promulgated by an agency. *See, e.g., K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). But where an agency is involved, a court need not strike down a regulation to effect a reconsideration by the issuing body. Thus, a court will issue a remand to the issuing agency if there is "substantial doubt" as to whether the agency intended its regulation to be severable. *North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790, 795–96 (D.C. Cir. 1984). Such a remand is often in the best interest of justice in that it allows the agency to reconsider the residue of its original regulation and keeps judges out of the business of administrators. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (overturning judicial severance of license conditions, remanding instead to FPC for new license determination in light of invalid provisions); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618–23 (1944) (overturning judicial construction of act and requiring instead Administrator to decide challenged definition anew in light of partial invalidation); *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 422–24 (D.C. Cir. 1990) (remanding case to NLRB to consider severability of unlawful clause in labor contract); *[Anonymous] v. Federal Deposit Ins. Corp.*, 617 F. Supp. 509, 518 (D.D.C. 1985) (permitting agency to reconsider order in its entirety, giving it "the maximum possible freedom to tailor precisely any ... order necessary"). We are particularly reluctant to reach out and decide constitutional issues that might dissolve upon a remand to the issuing agency. *See Meredith Corp. v. FCC*, 809

F.2d 863 (D.C. Cir. 1987). While we acknowledge that it is not within the jurisdiction of the FCC to declare an act of Congress unconstitutional, *Johnson v. Robison*, 415 U.S. 361, 368 (1974), the Commission may take constitutional considerations into account when promulgating rules. The Commission might, for example, draw on other statutory authority to broaden its restriction on "indecent" programming so as to mitigate the underinclusiveness of its present regulation. We express no opinion on the existence of other sources of statutory authority and believe that it is best left to the expert interpretation of the agency in the first instance.

The Commission did at one point consider the constitutional ramifications of distinguishing between leased access and commercial channels when imposing the segregation and blocking requirement. *See First Report and Order*, 8 F.C.C.R. at 1001 ¶¶ 18–20. However, the Commission's examination took place in the context of a broader regulation key parts of which have now been held unconstitutional. Its treatment of the "underinclusiveness" issue in any case was somewhat cursory and we cannot readily transfer that rationale to a situation in which only *leased access* channels are now regulated and only in one particular way.

III. Conclusion

Congress and the FCC sought to create a regulatory scheme in order to restrict children's exposure to indecent material on cable access channels. We do not denigrate its attempt to protect children. However, part of its execution in this case runs afoul of our Constitution. Congress and the FCC authorized private cable operators to ban indecent material from cable access channels in a manner that imbued those private cable operators with state action sufficient to trigger constitutional restrictions on their decision to ban indecent material. As a result, under our prior holding in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), the authorization of a complete ban on indecent material from access channels is unconstitutional under the First Amendment. The remainder of the regulation dealing with the blocked channel alternative

would now apply only to leased access channels while leaving indecent material on regular commercial channels and (as a result of our decision) PEG channels unregulated. This selective regulation of leased access channels alone could itself run afoul of the First Amendment if children remain abundantly exposed to indecent material on other similar cable channels, and unless the selective restriction is justified in terms relevant to the government's asserted interest in imposing the requirement. Reluctant to rule on constitutional issues prematurely, we remand the case to the FCC for reconsideration of the underinclusiveness of the remaining regulatory scheme in light of our invalidation of the portions authorizing cable operators to ban indecent material from all access channels. The stays ordered are hereby continued pending completion of proceedings on remand.

So ordered.